February 23, 2010

VIA ELECTRONIC COMMENT FILING SYSTEM (ECFS)

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: Ex Parte Communication, 47 C.F.R. § 1.1206
WT Docket No. 08-165, GN Docket Nos. 09-47, 09-51, 09-137, WC Docket No. 09-153, MB Docket No. 09-13

Dear Ms. Dortch:

On February 23, 2010, Ken Fellman, the President of NATOA, Gerry Lederer of Miller & Van Eaton, P.L.L.C., and I met with Angela Kronenberg and Louis Peraertz, Legal Advisors to Commissioner Mignon Clyburn, of the Federal Communications Commission. The purpose of the meeting was to discuss NATOA's Petition for Reconsideration or Clarification on the Commission's recent Wireless Facilities Siting Order (FCC 09-99, WT Docket No. 08-165).

Specifically, we discussed the practical, unintended, consequences of the order on the wireless facilities siting process. We answered Ms. Kronenberg's and Mr. Peraertz's questions on the issue and provided examples of instances where we believe "tolling" of the shot clock should be permitted for reasons beyond facial completeness and for circumstances that arise beyond 30 days after the application was filed.

We also provided Ms. Kronenberg and Mr. Peraertz with some documents as a follow-up to our conference call with Ms. Kronenberg on February 19, 2010. Those documents are attached to this letter.

Pursuant to Commission rules, please include a copy of this notice in the record for the proceedings noted above.

Sincerely,
/s/ Matthew R. Johnson
Matthew R. Johnson
Legal Fellow
NATOA

cc: Angela Kronenberg, Legal Advisor, Wireline
Louis Peraertz, Legal Advisor, Wireless

FCC ACTION COULD THREATEN LOCAL JOBS WITHOUT ANY GUARANTEE OF CONSUMER BENEFITS

INTRODUCTION

Many communications companies must place poles, wires and boxes on public property (including streets and rights-of-way) in order to reach customers. This property is very valuable, and Congress in the Communications Act recognized that the public's property need not be given away to private companies. Congress preserved local authority to require these companies to pay a fair rent for its use, just as other businesses pay rents for the properties they use.

- The FCC, as part of the National Broadband Plan (NBP), is being urged to establish a national standard for compensation for public property that requires states and localities to prove that fees are related to costs.
- This could immediately scorch municipal and state budgets (since providers would not pay those existing fees, and communities could not be certain what fees could be collected), and trigger a new wave of lay-offs and cuts in public services.
- There is no guarantee that any of the funds denied local government will result in any consumer benefits in the form of either increased broadband deployment or reduced prices.
- The reduction of funding will likely *reduce* broadband availability because local governments will have fewer funds to use to provide broadband to community institutions.

ACTION WILL HAVE A DRAMATIC AND HARMFUL IMPACT.

Declaring current fees unlawful, or calling their validity into question would result in hundreds of millions, if not billions, in revenue lost to local budgets. This is particularly true if, as some companies have suggested in the past, fees are federally-limited to recovery of out-of-pocket costs, and companies cannot be charged the fair market value of the public property that they use for private profit. Such a limitation would result in immediate and long-term transfer of public wealth to private communications companies, and losses in local revenues. These losses could lead to:

- Cuts in essential services such as public safety, housing, job placement and childcare at the very moment they are most needed.
- Layoffs of police, firefighters, and teachers, the same jobs the Obama Administration has worked so hard in the Recovery Act to preserve.
- Deepening of the recession experienced in these communities.

THERE IS NO GUARANTEE OF CONSUMER BENEFIT.

Federally limiting fees charged for use of public property to cost recovery will do nothing to increase broadband deployment and could undercut funding currently used by local governments to expand broadband to the most vulnerable of society.

- It is unlikely that the FCC will require providers to pass savings on to consumers or invest the savings from this government subsidy on more broadband deployment. History shows that they will not do so.

THERE ARE STEPS THE FCC CAN AND SHOULD TAKE.
There are steps that the FCC can and should take to enhance the availability of affordable broadband services. The FCC could start by acknowledging local governments' long-recognized property rights, and affirming what Congress declared: the FCC has no business deciding how states and localities price public property. In fact, the FCC should make it clear that local and state governments can encourage broadband deployment by giving preferential rates to companies that agree, for example, to build-out underserved areas. The FCC should also:

- Convene forums for the sharing and developing of best practices in rights-of-way management to facilitate broadband deployment. Specifically, a Task Force composed of local and state government officials responsible for managing and pricing public property could be developed to work with the FCC and NTIA to develop such best practices.
- Protect and encourage broadband deployment by encouraging localities to leverage their resources (including their own broadband facilities) to increase competition.

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THE UNITED STATES CONFERENCE OF MAYORS

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January 27, 2010

The Honorable Julius Genachowski
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Robert M. McDowell
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Mignon Clyburn
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

The Honorable Meredith Attwell Baker
Commissioner
Federal Communications Commission
445 12th Street , SW
Washington, DC 20554

Dear Commissioners:

As the Federal Communications Commission enters final deliberations on a National Broadband Plan, we write to urge you to reject proposals that would limit local authority to manage local rights-of-way and/or would negatively impact local budgets.

Congress recognized the importance of local control in Section 253 of the Communications Act. Moreover, any local government revenue loss in these difficult economic times could very well result in additional cutbacks of critical city services. The ongoing recession has had a devastating impact on city budgets. Cities of all sizes in all parts of the nation have been forced to institute layoffs, furloughs, service reductions, and fee increases. The next fiscal year looks even worse for cities, with more than four in five cities anticipating a budget shortfall. The nation's mayors do not believe Congress or the Obama Administration intended for the National Broadband Plan to be used as a vehicle to take revenue from city budgets in order to subsidize private entities.

Cities and their metropolitan areas are where 84 percent of our people live and more than 90 percent of future economic growth will occur. Mayors understand the role that broadband can play in enhancing educational opportunities, promoting economic development, improving health care delivery, assisting in achieving energy efficiency goals, and quite simply, determining if our cities can compete in the world economy. We also believe that rights-of-way management has served to promote, not retard, universal access to broadband services, while at the same time, protecting public health and safety, and keeping rights-of-way accessible for safe transportation.

The United States Conference of Mayors has been an active participant in the effort to develop a National Broadband Plan. And, we look forward to continuing to work with the Commission as you enter final deliberations and before the National Broadband Plan is forwarded to Congress. We appreciate the robust and open manner in which you have conducted the process for crafting the National Broadband Plan. Please feel free to contact Tom Cochran or Ron Thaniel of the Conference staff at 202-861-6711 if you have any questions.

Sincerely,

Elizabeth B. Kautz	Tom Cochran
Mayor of Burnsville	CEO and Executive Director
President	

Cc: David Agnew

The FCC Should Grant the Pending PEG Petitions to Protect Community Media

Public Educational and Governmental ("PEG") channels serve the public interest by uniquely meeting the needs of communities. The FCC should grant the pending PEG petitions: CSR-8126, CSR-8127, and CSR 8128 in MB Docket No. 09-13 as a means to protect communities and consumers' interest.

PEG channels make local governments more transparent, provide educational tools after school, serve as a conduit for emergency communications, and add to the marketplace of ideas by ensuring community access.

- There is no "one-size-fits-all" model for public access channel programming.
- PEG Channels are local and non-commercial. Local PEG channels serve the public interest by providing local and diverse noncommercial video content.
- PEG channels foster transparency in local government by cable-casting public meetings and events. In addition, they provide information about vital government services, such as voter registration, public health and low-income assistance.
- PEG channels promote important initiatives and public services, such as fitness programs for seniors, healthy food and nutrition tips for low income families, as well as after school homework helper programs and information about free parks and recreation programs.
- PEG channels are used to distribute disaster preparation programming, to provide real-time information on evacuations, road closures and service outages during an emergency, and to publicize recovery efforts to inform victims about assistance centers and relief services after the fact.
- PEG channels, and particularly public access channels, play a unique role in many cities, as an "electronic soapbox" to encourage the expression of a wide range of local viewpoints.

Discriminatory placement of local PEG channels on inferior channel tiers or video streams will frustrate the public interest by restricting access to the valuable and beneficial content available only on PEG

- Slamming local PEG channels to high-numbered tiers or relegating them to a Channel 99 maze of menus will make the channels difficult for viewers to find.
    - Unlike the commercial channels, PEG operators have virtually no resources to market the channels or channel locations, and are unable to benefit from national or regional branding campaigns to help direct viewers to the channel numbers.
    - PEG channels operators rely on "channel surfing" for viewers to discover the content on these channels, and for channel number recognition to allow viewers to locate the information required easily and quickly.
- In the case of AT&T's channel 99, the process of finding the PEG channels is physically cumbersome, time consuming and frustrating for the viewer.
    - Channels relegated to this tier lack the basic functionality expected with today's video services. For example, they cannot be recorded on a DVR, nor can they be located on an interactive program guide, nor can the viewer toggle back and forth from a PEG channel back to a commercial channel.
    - The inability to provide closed captioning and secondary audio channels frustrates viewers with special needs.

National Association of Telecommunications Officers and Advisors

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CABLE TELEVISION LAW 2009:
COMPETITION IN VIDEO, INTERNET AND TELEPHONY

LOCAL COMMUNITIES AND COMMUNICATIONS NETWORKS: KEY ISSUES 2009

NICHOLAS P. MILLER
JOSEPH VAN EATON
Miller & Van Eaton, P.L.L.C.

PRACTISING LAW INSTITUTE

New York City
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2009

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Primary Areas of Practice: Telecommunications, specializing in representing local governments and non-profit groups across the country. Mr. Van Eaton is working with a coalition of cities challenging recent FCC orders establishing federal franchise standards, and has successfully defended many cities against federal law challenges to local telecommunications and cable ordinances.

Law School: University of Pennsylvania
Graduate School: Syracuse University

Work History:

1979 to 1988 - Spiegel & McDiarmid	
1988 to present –	**Miller & Holbrooke** **Miller Canfield Paddock & Stone** **Miller & Van Eaton**

Professional Memberships: Federal Communications Bar Association; District of Columbia Bar Association

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Primary Areas of Practice: Mr. Miller is expert in the law and policy governing cable television and telephone regulation, and in the legislative aspects of communications law. He is a well-known advocate for the interests of local governments, airports, and national local government associations in cable television and telecommunications matters. He served as the U. S. Senate Communications Counsel and as a special consultant to the White House on telephone deregulation issues. He has worked extensively with international multilateral agencies engaged in telecommunications policy advice to developing countries. And Mr. Miller is widely recognized for his lobbying experience with the Cable Act of 1984 and 1992, the AT&T divestiture, and the Telecommunications Act of 1996. He currently represents the coalition of local governments which is challenging the FCC's preemption of local cable franchise authority in the United States Court of Appeals for the Sixth Circuit.

Law School & Undergraduate: University of Washington

Work History:

1975 to 1977 – Communications Counsel to the Senate Commerce Committee

1977 to 1978 – Private Consultant to the White House Staff and the Office of Telecommunications Policy during the Carter Administration

1978 to 1982 – entered private practice

1982 to present – **Miller & Holbrooke**
Miller Canfield Paddock & Stone
Miller & Van Eaton

Professional Memberships: American and Federal Communications Bar Associations; Honorary life-time member of the National Association of Telecommunications Officers and Advisors, where he was their 1995 Member of the Year; International Municipal Lawyers Association.

Mr. Miller was a founding partner of the Washington, D.C. law firm Miller & Holbrooke. Prior to law school, Mr. Miller served in the U.S. Navy in Vietnam where he saw extensive combat. Mr. Miller holds the Silver Star, the Purple Heart and other combat commendations. Federal Communications Bar Association; District of Columbia Bar Association.

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2. *City of Dearborn v. Comcast of Michigan*, Case No. 08-10156, Opinion on Motion to Dismiss (E.D. Mich. Oct. 3, 2008).

3. *City of Dearborn v. Comcast of Michigan*, Case No. 08-10156, Order Denying Defendants' Motion for Reconsideration (E.D. Mich. Nov. 24, 2008).

4. Letter to Congressman Serrano from Dana S. Appling, DRA, (Sept. 9, 2008).

5. Letter from Kenneth P. McNeeley to Dana S. Appling, (Sept. 19, 2008).

6. Testimony of Barbara Popovich, *Alliance for Community Media* (Sept. 17, 2008).

7. AT&T's PEG Roadmap.

8. *City of Dearborn v. Comcast of Michigan*, Case No. 08-10156, Order Denying in Part Plaintiffs' Motion for Partial Reconsideration (E.D. Mich. Nov. 25, 2008).

9. *City of Dearborn v. Comcast of Michigan*, Case No. 08-10156, Order Referring Seven Questions to the Federal Communications Commission Pursuant to the Primary Jurisdiction Doctrine (E.D. Mich. Nov. 26, 2008).

LOCAL COMMUNITIES AND COMMUNICATIONS NETWORKS: KEY ISSUES 2009

NICHOLAS P. MILLER
JOSEPH VAN EATON
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I. OVERVIEW

There were at least three important trends in 2007-2008 in cable and telecommunications regulation for local governments. First, the courts are increasingly electing not to second-guess local governments' exercise of police powers and claims for compensation with respect to providers' use of local rights-of-way. Indeed, in what may prove to be a watershed event, the Ninth Circuit overturned a widely-cited decision that had been read to broadly preempt local authority to regulate use of rights-of-way by telecommunications service providers.

Second, the FCC has demonstrated a willingness to assert broad authority over any matter that is addressed within the Communications Act, even in areas where it has long been assumed that the agency's authority is circumscribed. Two recent examples – the FCC's actions with respect to cable franchising and MDU access – illustrate this trend. The Sixth Circuit's decision upholding the Commission's first cable franchising order has already emboldened the wireless industry to ask the Commission to expand its authority under the Communications Act still further, and to regulate local zoning procedures.

Third, developments at the FCC and in the courts emphasize that the transition of communications systems to digital formats will lead to unanticipated challenges that existing cable franchises and state laws often do not adequately address.[1]

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[1] Additional information on these issues, and additional resource material, can be found at www.millervaneaton.com.

II. AN UPDATE ON FEDERAL LITIGATION ARISING OUT OF SECTION 253 OF THE COMMUNICATIONS ACT

Telecommunications law for municipalities has been characterized by an on-going clash between local governments' right to control and to gain the benefit of their property, and telecommunications providers' desire to burden and use that property at no (or minimal) cost. At the center of this dispute has been Section 253 of the Communications Act. 47 U.S.C. § 253(a). While Section 253's plain language appears to preempt local requirements only in limited circumstances, certain early decisions, including the widely-cited *City of Auburn v. Qwest Corporation*, 247 F.3d 966 (9th Cir. 2001), had adopted a broad reading of the statute's preemptive scope. In recent years, however, courts have taken a different approach – a trend that culminated in 2008, when an *en banc* panel of the Ninth Circuit overturned *Auburn*. With a renewed focus on Section 253(a)'s plain language, the courts appear to be increasingly reluctant to interfere with local police powers and property management.

A. Local Government Authority To Manage The Rights-Of-Way.

As with all property law, a local government's authority over its rights-of-way is determined to a large degree by state law. As a general matter, local governments either own their public rights-of-way in fee, or at least are trustees for their use for the benefit of the whole community. Localities grant private parties, including communications companies, valuable rights to use and occupy those rights-of-way including:

(1) The *option* to place facilities throughout the public rights-of-way, and thus to burden those rights-of-way;

(2) A right to *burden* the public rights-of-way through construction work, and then on an ongoing basis through repairing and maintaining facilities in the limited space within the streets and public utility easements; and

(3) The ability to *use* the public rights-of-way in doing business.

However, the Telecommunications Act of 1996 established federal limits on the exercise of that authority. Section 253 of the 1996 Act, 47 U.S.C. § 253, titled "Removal of Barriers to Entry," has been one of the principal foci of federal judicial decisions since 1996 regarding local authority over rights-of-way. Sections 253(a)-(c) provide:

> (a) IN GENERAL.--No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State Regulatory Authority.--Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) State and Local GOVERNMENT AUTHORITY.--Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Also critical, but less litigated, is Section 601 of the Telecommunications Act, which appears at 47 US.C. § 152 nt. Section 601 provides:

> (c) FEDERAL, STATE AND LOCAL LAW.
>
> (1) NO IMPLIED EFFECT. This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede

> Federal, State or local law unless expressly so provided in such Act or amendments.
>
> (2) STATE TAX SAVINGS PROVISION.-Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

B. The Interpretation of Section 253.

Section 253(a) and (c) lie at the heart of the dispute between local governments and telecommunications providers with respect to the use of local government rights-of-way.[2] Under the plain language of the statute, Section 253(a) operates as the only preemptive provision of Section 253, while Section 253(c) operates as a safe harbor to protect local governments from such preemption.[3]

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[2] While Section 253(b) refers only to the authority of a "State," the FCC has concluded that the subsection also protects the exercise of authority delegated by the state to a locality. *In re Classic Telephone*, 11 FCC Rcd. 13802 at ¶ 34 (1996). As responsibility for "public safety and welfare" is often at least in part the responsibility of local governments, this exception may prove quite important, although it has not been much-litigated to this point. Subsection (d) of § 253 gives the FCC authority to determine whether a particular requirement prohibits entry, but provides that the FCC has no jurisdiction to determine whether a particular provision is protected by the safe harbor of § 253(c). *See* 141 Cong. Rec. S8308 (1995) (statement of Sen. Gorton).

[3] Some courts have departed from this plain language and suggested that even if there is *no* prohibition within the meaning of Section 253(a), a local law is preempted if it falls outside the safe harbors of Section 253(b)-(c). *Compare Bell Atlantic-Maryland, Inc., v. Prince George's County, Maryland*, 49 F. Supp. 2d 805, 816 (D. Md. 1999), *vacated* 212 F.3d 863 (4th Cir. 2000) with *City*

We consider both Section 253(a) and Section 253(c) in turn.

1. <u>Section 253(a)</u>

On its face, Section 253(a) only bars a narrow class of local laws: those that "prohibit or have the effect of prohibiting the ability" of an entity to provide telecommunications service. Interpreting this language, the FCC has adopted an approach to Section 253(a) that is generally favorable to localities. *In re California Payphone Ass'n*, Opinion and Order, 12 FCC Rcd. 14191 (1997), states that the first question in any Section 253(a) analysis is whether there is an *explicit* prohibition on entry. If there is none, "[w]e then consider whether the Ordinance has the *practical effect* of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." *Id.* at 14,204 ¶ 27. Another decision, *In re Public Utility Comm'n of Texas,* 13 FCC Rcd. 3460, emphasizes that there is no effective prohibition unless challenged requirements "materially inhibit or limit the ability" of an entity to compete. *Id.* at 3470 ¶ 22.[4] It also indicates that in determining whether a Section 253 violation has occurred, the key is "implementation," not speculation. *Id*. at 3465 ¶ 10. The burden is on the telecommunications service provider to prove that there is a prohibition. If that burden is not met, the case is over. If

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of Auburn v. Qwest Corporation, 247 F.3d 966 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002); *BellSouth Telecommunications, Inc., v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. May 25, 2001). However, most appeals courts have rejected this approach, finding that Section 253(c) only functions as a safe harbor to preemption under Section 253(a). *See, e.g., Level 3 Communications, LLC v. City of St. Louis*, 477 F.3d 528, 532 (8th Cir. 2007); *see also Illinois Bell Telephone Co. v. Village of Itasca*, 2007 WL 1560263, *8 (N.D. Ill. 2007). Level 3 recently filed a Petition for Certiorari to the Supreme Court, asking that Court to review the 8th Circuit's decision in *Level 3 Commc'ns v. City of St. Louis*, 477 F.3d 528 (2007), discussed *infra*. That petition argues that the majority view is wrong.

[4] Even this test may be more generous to the telecommunications industry than is warranted by the plain language of the law, as the Ninth Circuit has recently recognized.

the burden is met (according to the FCC), the burden then shifts to the locality to explain why it believes that a challenged provision falls within the ambit of the safe harbors of Sections 253(b)-(c). *Classic Telephone, Inc., Petition for Preemption of Local Entry Barriers*, 11 FCC Rcd. 13082 (1996).

Not all of the early Section 253(a) cases read and applied this language narrowly. Instead, in a widely-cited case, *City of Auburn v. Qwest Corporation*, 247 F.3d 966 (9th Cir. 2001), the Ninth Circuit, using very loose language that had almost nothing to do with the facts of the case, stated that preemption under Section 253(a) is "virtually absolute." *Id.* at 980. The Court went on to state, variously, that the statute preempts "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may ... have the effect of prohibiting' the provision of such services." *Id.* at 980. The court ruled that a regulatory structure "that *allows* a city to bar a telecommunications provider from operating in the city" should be preempted, *id.* at 981 (emphasis added), even if a plaintiff had not shown that the regulatory structure has had such an effect. In deciding that the ordinances before it should be preempted, the court found the fact that the local government "reserves discretion to grant, deny, or revoke the franchises" significant, when combined with other, undefined factors. *Id.* at 981. None of these formulations was actually essential to the disposition of the case. Even the "may prohibit" test, as used in the decision, should have been understood as a linguistic shorthand. Nonetheless, other Ninth Circuit panels felt compelled to repeat the formulation, *Qwest Corp. v. City of Portland*, 385 F.3d 1236, 1241 (9th Cir. 2004) (noting that because of the "may prohibit" test, a plaintiff is not required to show service that it cannot provide); *Qwest Communications Inc. v. City of Berkeley*, 433 F.3d 1253, 1256 (9th Cir. 2006). And some district courts, in and outside the Ninth Circuit, began to view the "may prohibit" test as preempting local laws any time a law *might possibly* have any adverse effect on market entrants.

By and large, however, appellate courts, even those that used the "may prohibit" language, applied the FCC tests and required plaintiffs to show that a challenged local law prohibited or effectively prohibited them from providing some service. In *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir.

2002), for example, the Second Circuit, like *Auburn*, found it problematic that City had the "right to reject any application based on any 'public interest factors . . . that are deemed pertinent by the City.'" *Id.* However, the court applied the FCC's test and found it significant that TCG faced "extensive delays" in securing a franchise. *Id.* At the time of the lawsuit, TCG had been in attempting to obtain a franchise for over a year, and still lacked access to the City's rights-of-way. *Id.* at 71.

Likewise, in 2004, the Tenth Circuit found that a City of Santa Fe ordinance ran afoul of Section 253(a) because it "create[s] a massive increase in cost" and because the City has "unfettered discretion" to prohibit the provision of services. Qwest Corp. v. City of Santa Fe, 380 F.3d 1258, 1270 (10th Cir. 2004). The court concluded that under the FCC's test, the "substantial costs generated" by the Ordinance create a violation of Section 253(a). Id. at 1271 (citing In re Cal. Payphone Ass'n, 12 F.C.C.R. at 14206 (1997)).

In 2006, the First Circuit found a prohibition where a municipal ordinance had substantially increased the fee for using the rights-of-way to 5% of gross revenues. Puerto Rico Telephone Co. v. Municipality of Guayanilla, 450 F.3d 9, 18 (1st Cir. 2006).5 Notably, both Santa Fe and Guayanilla involved a change in fee structures. In the Tenth Circuit and in the First Circuit cases, the defendants did not present any evidence that would tend to show

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5 The decision has been read by some to suggest that a Section 253(a) analysis is not limited to the burdens imposed by the challenged municipality's regulation, but may be satisfied by showing the burdens which would follow if the same regulation were adopted by "multiple municipalities." *Id*. at 17. However, this is not the best reading of the case. Because the provider did not track its revenues in the municipality, the court merely used commonwealth-wide statistics, as a proxy for municipal-specific impact. As the court put it: "The impact of a Commonwealth-wide 5% gross revenue fee on PRTC's overall profitability would be significant, and, as PRTC argues, it is reasonable to conclude that the effect of Ordinance No. 40 on the profitability of its operations within the Municipality would be similarly, or perhaps even more, substantial." *Id*. at 18-19.

that the increase was insignificant or immaterial. Rather, the cases proceeded on the assumption that the change in the fees being charged was likely to have a significant impact on providers.

In 2007, the Eighth Circuit was faced with a case that forced it to confront more directly the question of exactly what Section 253(a) requires. Relying on *Auburn* and its progeny, Level 3 Communications sought a declaration that the City of St. Louis's legal requirements ran afoul of Section 253 because they "may prohibit" Level 3's ability to provide service. Level 3 claimed this was so because the City's fees imposed financial burdens upon it (and financial burdens *might* have a prohibitive effect). However, Level 3 had been operating in the City since 1998, and did not make any factual showing that the City's laws had prohibited it (or any other entity) from providing any service in the City; in fact, Level 3 admitted that it could point to no effect on its ability to provide service. The Eighth Circuit rejected Level 3's claim. *Level 3 Commc'ns v. City of St. Louis*, 477 F.3d 528 (8th Cir. 2007). Repudiating the "may prohibit" test, the Court declared: "No reading [of Section 253] results in a preemption of regulations which might, or may at some point in the future, actually or effectively prohibit services". *Id*. at 533. Instead, the Court held:

> [A] plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of prohibition. The plaintiff need not show a complete or insurmountable prohibition, but it must show an existing material interference with the ability to compete in a fair and balanced market.

Id. (citing *Cal. Payphone Ass'n*, 12 FCC Rcd. 14206 (1997)) (internal citations omitted). The decision also suggests that Section 253(a) analysis should not extend more generally to the impact on "any" entity, but is limited to the impact on the plaintiff itself:

> Level 3 further admits in its response to interrogatories that it "cannot state with specificity what additional services *it* might have provided had it been able to freely use the money that it was forced to pay to the City for access to the public rights-of-way." This

> admission establishes that Level 3 has not carried its burden of proof on the record we have before us.

Id. at 533-534 (emphasis added).

While the Level 3 case was proceeding in the Eighth Circuit, trouble was brewing for localities in the Ninth. A district court, and a court of appeals panel, had overturned a zoning ordinance adopted by the County of San Diego because the zoning ordinance (like all zoning ordinances) left the County with the discretion to deny an application on aesthetic and other grounds that were necessarily subjective. This meant (the courts thought) that the ordinance *might* be applied to prohibit entry, and hence violated Section 253(a) under a "may prohibit" test. This forced the Ninth Circuit, sitting *en banc*, to confront exactly what it meant by the "may prohibit" test. In 2008, the Ninth Circuit overturned *Auburn*. The court of appeals explained:

> Our previous interpretation of the word 'may' as meaning "might possibly" is incorrect. We therefore overrule *Auburn* and join the Eighth Circuit in holding that "a plaintiff suing a municipality under section 253(a) must show actual or effective prohibition, rather than the mere possibility of preemption."

Sprint Telephony PCS, LP v. County of San Diego, 543 F.3d 571, 578 (9th Cir. 2008). The court noted that its interpretation was consistent with the FCC's. *Id.* (citing *In re Cal. Payphone Ass'n*, 12 FCC Rcd. 14191, 14209 (1997)). Applying the standard, the court made clear that the mere existence of discretion is not a violation of the statute:

> A certain level of discretion is involved in evaluating any application for a zoning permit. It is certainly true that a zoning board *could* exercise its discretion to effectively prohibit the provision of wireless services, but it is equally true (and more likely) that a zoning board would exercise its discretion only to balance the competing goals of an ordinance – the provision of wireless services and other valid public goals

> such as safety and aesthetics. In any event, Sprint cannot meet its high burden of proving that "no set of circumstances exists under which the [Ordinance] would be valid," simply because the zoning board exercises some discretion.

Id. at 580 (citation omitted).

Moreover, the Ninth Circuit concluded that its decision was compelled by the plain language of the statute.

In some ways, *Level 3* and *Sprint Telephony* simply clarified standards that the FCC had outlined years before. Nonetheless, the cases are significant, because they are likely to discourage lawsuits except where a challenged ordinance is being applied in a way that actually has a meaningful impact on market entry. Not surprisingly, the decisions are being challenged. On November 7, 2008, Level 3 filed a Petition for a Writ of Certiorari with the Supreme Court; a Sprint petition is also expected with respect to the Ninth Circuit's decision.[6]

2. Section 253(c)

Although not tested in *Level 3*, *Sprint*, or other recent cases, the breadth of the safe harbors under Section 253(c) remains in dispute. While there is no question that local governments can

[6] Level 3 maintains that the Eighth Circuit is wrong, and argues that the Supreme Court should take the case to resolve a circuit split that is "widespread and entrenched." Petition at 24. The petition is available at http://www.scotusblog.com/wp/wp-content/uploads/2008/11/level-3-v-st-louis_petition.pdf. It is not so clear that there is a significant split at the Circuit Court level. Even at the district court level, many courts have been moving toward a test that required some showing of impact. In *Pacific Bell Telephone Co. v. California Dept. of Transp.*, 365 F. Supp. 2d 1085, 1088 (N.D. Cal. 2005), the district court suggested that the statute requires a plaintiff to show a significant economic impact. To the same effect are *City of Portland, Or. v. Electric Lightwave, Inc.*, 452 F. Supp. 2d 1049, 1061 (D. Or. 2005), and *Time Warner Telecom of Oregon, LLC v. City of Portland*, 452 F. Supp. 2d 1084, 1093 (D. Or. 2006).

require some compensation for use of their rights-of-way,[7] telecommunications providers argue that compensation is limited to the marginal cost of issuing permits, while municipalities argue that the law permits them to charge a rent that is not confined to recovering costs. *Puerto Rico Telephone Co., Inc. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534 (D.P.R. 2003) summarizes the then-existing case law on point, and notes that the trend favors the municipal view. However, on appeal, the First Circuit found that the municipality's gross revenue fee was not saved by the subsection (c) safe harbor:

> We need not decide whether fees imposed on telecommunications providers by state and local governments must be *limited* to cost recovery. We agree with the district court's reasoning that fees should be, at the very least, *related* to the actual use of rights of way and that the costs of maintaining those rights of way are an essential part of the equation. In this case, the appellants have presented no evidence of the Municipality's costs of maintaining the public right of way. …[A]bsent evidence of costs, the Court cannot determine whether the Ordinance results in fair and reasonable compensation as opposed to monopolistic pricing.

Puerto Rico Telephone Co. v. Municipality of Guayanilla, 450 F.3d 9, 22 (9th Cir. 2006) (internal citations and quotation marks omitted).[8] If read to require a locality to base the price it charges

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[7] See *White Plains*, 305 F.3d at 82 (finding a regulation "might permit rejection of a transferee on the basis of insufficient assurance of ability to pay reasonably imposed fees for use of rights-of-way"); *Global Network Communications, Inc. v. City of New York*, 2007 WL 2471813, 5 07 F.Supp.2d 365 (S.D.N.Y. 2007) (noting that "the City's right to require compensation from telecommunications providers includes the reasonable expectation that its compensation will be paid accurately in full, on time, and without criminal involvement or fraud").

[8] The district court in *Level 3 Communications v. City of St. Louis* also struck down the City's linear-foot based right-of-way fees

for rights-of-way on costs, the decision is misguided: competitive prices are often set without explicit consideration of cost. The value of a property purchased in 1900 is not based on its costs, but on the value of similar properties in the marketplace. The case is better understood as meaning that it is up to the locality to show that the price it charges is a reasonable price, and not a monopoly price. This could be done (as was the case in *Level 3*), by showing how the charges levied compare to charges for similar private properties. In the *Portland* cases, the City showed that the cost of managing and acquiring the rights-of-way significantly exceeded the rents it was receiving from utility companies, and also showed that the fee charged for use of the rights of way was consistent with charges for public and private rights-of-way.

Recent case law also emphasizes that compensation must be “nondiscriminatory” and “competitively neutral.” In some states, the incumbent local telephone company claims to operate pursuant to a state or pre-statehood franchise, and asserts the right to operate pursuant to that franchise without making any payment to localities. The ancient grants may not protect new entrants, however, and so the question arises as to whether one can charge a fee for use of the rights-of-way to a new entrant if the incumbent is not subject to such a requirement. The Sixth Circuit has recognized that differences in state law can justify different treatment of providers, at least in cases where the local government is willing to apply the fee to all providers, but state law prevents it (and the state law is not challenged). *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000). The Second Circuit has questioned that analysis, but held explicitly that Section 253(c) “does not require precise parity of treatment” and that franchise fees “need not be equal.” *TCG New York v. City of White Plains*,

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because they were not based on the actual costs incurred by the City, and hence, the court held, were not “fair and reasonable” within the meaning of 47 U.S.C. § 253(c). *Level 3 Communications v. City of St. Louis*, 405 F.Supp. 2d 1047, 1057-58 (E.D. Mo. 2005). However, the district court decision is not good law in light of the Eighth Circuit decision reversing the district court’s finding of a prohibition under 47 U.S.C. § 253(a). 477 F.3d 528.

305 F.3d 67, 80 (2d Cir. 2002).[9] Finally, there is the issue of *who* must be treated in a nondiscriminatory manner. If a local government treats itself one way, must it treat others comparably? Or can a local government take advantage of the benefits that every landlord enjoys vis-à-vis his tenants?

It is also not clear what constitutes protected "management of the rights-of-way" within the meaning of Section 253(c). As to some matters, there is little dispute. The FCC has indicated that:

> Section 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of- way.... [T]he types of activities that fall within the sphere of appropriate rights-of-way management ... include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

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[9] In *White Plains*, the locality had voluntarily chosen not to apply an ordinance requiring payment of rents to the incumbent. The fee provisions in the ordinance were struck down on the ground that they were discriminatory and not competitively neutral, although the court also emphasized that it was not ruling that the same charge had to be applied to all market participants. In *Dearborn*, the court ruled that the City *could not* apply its fee to the incumbent consistent with state law. It is not clear how the *White Plains* court would have ruled if presented with the same facts presented to the *Dearborn* court, although the Second Circuit clearly criticized the Sixth Circuit's analysis.

In re TCI Cablevision of Oakland County, Inc., 12 FCC Rcd. 21396 (1997), ¶ 103, 1997 WL 580831. The FCC based its analysis on statements by Senator Diane Feinstein, who read into the Congressional record a letter that urged Congress to protect local authority over rights-of-way, including the authority to:

> (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation.""

In re Classic Telephone, Inc. 11 FCC Rcd. 13082 (1996), ¶ 39, 1996 WL 554531 (*quoting* 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco).

Some courts have suggested that right-of-way management encompasses only these specified activities, *see Prince Georges*. *Auburn* suggests that the distinction is between a regulation aimed at the rights-of-way, and a regulation of the provider (a line that is far from clear); *White Plains* made a similar distinction, but went on to suggest that the issue is whether the challenged requirement is "reasonably related to regulating the use of the rights-of-way." In order to fall within the "management" safe harbor, it appears a locality must at least be able to articulate a credible nexus between the proposed regulation and rights-of-way management. *Cox Communications PCS v. City of San Marcos*, 204 F. Supp. 2d 1260 and 1272 (S.D. Cal. 2002) (noting that provisions which have simply too tenuous a connection to the 'management of the rights-of-way' will not be saved under 253(c)). Courts are concerned that unless *some* line is drawn, almost any requirement could be justified as a rights-of-way management requirement. On the other hand, second-guessing the manner in which the rights-of-way is regulated should not be appropriate under Section 253(c), which was designed to protect municipal rights-of-way discretion and choices related to conflicting demands on rights-of-way.[10] The district court in the *Level 3/St. Louis* case upheld a variety of right-of-way management provisions, including a license application and revocation process, conduit installation requirements, reporting requirements, indemnification, city consent prior to transfer, and minimum technical requirements. 405 F. Supp. 1059-63.

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While the ultimate interpretation of Section 253 is still in doubt on many key points, there is federal case law that recognizes the right of localities to charge rents for use of the rights-of-way (and not just recover costs), and increasingly courts are upholding reasonable rules for use of the rights-of-way. However, that does not mean that local authority is unlimited. Courts have tended to be willing to protect traditional local authority, but unwilling to allow localities to leverage this traditional authority into broader regulation of telecommunications services.

III. THE FCC HAS ASSERTED BROAD AUTHORITY OVER VARIOUS MATTERS IN THE COMMUNICATIONS ACT.

Recent years have seen the emergence of a second important trend for local governments: the FCC's claim to broad authority over matters that had been widely believed to be beyond the Commission's authority. Two recent matters demonstrate this

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[10] A recent district court case, *Southwestern Bell Telephone, L.P. v. City of Houston*, 2007 WL 954744 (S.D. Tex. March 29, 2007), dealt with a challenge to a City ordinance requiring owners of facilities in the rights-of-way to relocate those facilities at their own expense. The Court held that the relocation requirement fell within the safe harbor provision of Section 253(c) because it related to the City's management of its public rights-of-way. *Id.* at *4. The Fifth Circuit affirmed the decision. 529 F.3d 257 (5th Cir. 2008).

trend: (1) the FCC's regulation of "unreasonable refusals" of cable franchise grants; and (2) the FCC's regulation of MDU access.

A. The FCC's Intrusion Into the Local Franchising Process – Background.

1. The Cable Act.

The federal Cable Act requires every cable operator to obtain a franchise, and protects local or state authority to issue those franchises. Section 621(a)(1), 47 U.S.C. § 541(a)(1). However, the Act also states that a local franchising authority "may not unreasonably refuse to award an additional competitive franchise." The next sentence provides that any applicant whose request for a franchise has been denied "may appeal such final decision" to the courts pursuant to Section 635, 47 U.S.C. § 555.

2. The FCC's Rulemaking.

After Congress refused to adopt a national franchising regime in 2006, the FCC commenced a rulemaking to consider whether it had authority to define what it meant for a locality to "unreasonably refuse" to issue a competitive franchise, and whether it was necessary for it to do so. This was an extraordinary step for the agency, which had not claimed the right to regulate the local franchising process in the two decades following the adoption of the Cable Act.

3. The First Order.

In Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, <u>Report and Order and Further Notice of Proposed Rulemaking</u>, 22 FCC Rcd. 5101 (2007) ("*First Order*"), the FCC found that local governments – but not states – were unreasonably delaying competitive entry through the local franchising process. It found that it had the authority to adopt rules to address the delays.

The FCC based its claimed authority over franchising on Section 621, although that provision on its face appeared to establish a standard and a process for court review – not an invitation to FCC action. The FCC rested its authority in part on the claim that under federal law, it was the ultimate franchising authority.

The FCC stated that it would treat five types of practices as unreasonable refusals to grant a new entrant a franchise: (1) negotiations that exceed certain time limits; (2) "unreasonable build-out requirements"; (3) demands for "costs, fees, and other compensation" exceeding the five percent franchise fee cap; (4) demands for "certain unreasonable obligations relating to public, educational, and governmental ('PEG') and institutional networks (I-Nets');" and (5) certain local attempts to exercise jurisdiction over "mixed-use networks." The FCC purported to broadly preempt local laws inconsistent with any part of the *First Order*. This included, *inter alia*, local charter procedural requirements. The FCC also broadly found that in many cases so-called "level playing field" or "most favored nations" clauses in existing franchises had the effect of imposing unreasonable obligations on new entrants, and for that reason were preempted.

The *First Order* rules did not apply in states where the state government has limited local authority. The rules also did not apply to incumbents, but the *Further Notice* asked for comments as to whether the rules should be extended to incumbents – and ultimately, some of them were, in a Second Order adopted on October 31, 2007, *In The Matter Of Implementation Of Section 621(A)(1) Of The Cable Communications Policy Act Of 1984 As Amended By The Cable Television Consumer Protection And Competition Act Of 1992*, Second Report and Order, MB 05-311, FCC 07-190, 2007 WL 3287415 (FCC Nov. 6, 2007) ("*Second Order*").

4. The Second Order.

In the *Second Order*, the FCC extended some, but not all, of the requirements of the *First Order* to incumbent cable operators. While the *Second Order* applies to existing franchises, the FCC did not preempt any existing requirements, and made it clear that operators were obligated to continue to comply with existing requirements until after a "case by case" determination that its *Second Order* rendered a particular franchise provision unlawful. Notably, the FCC endorsed *differential* treatment of incumbents and new entrants in several key respects including the following:

- The FCC found that it was reasonable to require incumbents to continue to serve the entirety of a franchise area, even if a new entrant was not required to do so.
- The FCC concluded that different and more burdensome PEG and institutional network requirements can be imposed on an incumbent than on a new entrant, even in renewal franchises.

5. Particular Requirements of the Orders.

a) Time Limits for Action.

In the *First Order*, the FCC found that it was unreasonable for a local government to take more than 90 days to act upon a complete cable franchise application submitted by a new entrant with authority to be in the rights-of-way, and 180 days in other cases. If a community fails to act within the time limits, an interim franchise is deemed granted, on the terms prescribed by the *applicant.* The *Second Order* found that the time limits do not apply to incumbent operators.

b) Unreasonable build-out requirements.

The *First Order* preempted what the FCC concluded were "unreasonable" build-out requirements on new entrants. The rules are very vague as to what is "unreasonable" but some new entrants are taking the position that a locality may not impose any build-out requirements, and certainly none that require a new entrant to build beyond the portion of a community that it desires to serve. The FCC found that limits on "unreasonable build-out" do not apply to incumbents operators.

c) The franchise fee.

The FCC found that certain charges are franchise fees, and count against the federal 5% franchise fee limit. Most notably, the *First Order* could have been read to indicate that PEG "capital costs" for "construction" of facilities do not count against the fee, but that other PEG payments do. The FCC also indicated that fees charged by localities to recover costs associated with renewal and transfer (except for certain *de minimis* costs) count against the franchise fee. The FCC concluded that what it called non cable-related "inkind" payments also count against the franchise fee. Finally, the FCC found that a locality could not use its Title VI Cable Act franchising authority to levy a franchise fee on non-cable services. These rulings were extended to incumbents by the *Second Order*. But, in the *Second Order* the FCC also indicated that a locality could use *state* authority to impose an additional fee if a cable operator uses its cable system to provide services other than cable services.[11]

d) PEG requirements.

In the *First Order,* the FCC indicated that certain PEG and INET requirements would be unreasonable – including requirements that it characterized as "duplicative." While the *Order* is vague, the FCC indicated a new entrant could not be required to provide more than the incumbent, regardless of circumstances – even if, for example, the incumbent's franchise is near expiration or is out of date, and the new entrant is seeking a long-term franchise for the future. In its appeal brief, the FCC suggested that localities could include a provision in a new entrant's franchise that required it to "ratchet up" its obligations if the incumbent's obligations increased. In the *Second Order,* the FCC concluded that localities could impose more burdensome requirements on incumbents, and that its finding that "duplicative" requirements were unreasonable did not apply.

e) Mixed Use Networks.

In the *First Order,* the FCC assumed (incorrectly) that new entrants are telephone companies that have authority to place facilities in the rights-of-way independent of any authority granted under the Cable Act. It therefore concluded that local authority

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[11] However, in a decision that was issued just days before this paper was submitted for publication, the Illinois Supreme Court held that Chicago could not impose a franchise fee on Comcast's provision of cable modem service, *City of Chicago v. Comcast Cable Holdings, L.L.C.* --- N.E.2d ----, 2008 WL 4943654 (Ill. 2008). The decision appears to be based on the particular phrasing in the franchise at issue, and suggests that local governments must take great caution to ensure that the right to charge a fee in addition to a fee on cable services is preserved.

under the Cable Act extended to "cable services" and not generally to "mixed use networks" used to provide video and other services. The FCC indicated that this means that cable franchising authority cannot be used to regulate non-cable services (but it also emphasized that non-cable services might be subject to regulation under local or state police power authority). While the focus of the FCC's discussion was on the regulation of non-cable services, new entrants can be expected to point to this ruling as support for claims similar to those made by Verizon in New York State, to the effect that localities have no additional authority over facilities installed for telephone purposes merely because the facilities are also used to deliver cable services. (That claim was expressly rejected by the New York State Public Service Commission). In the *Second Order*, the FCC extended the "mixed use" ruling to incumbents, even though the rationale underlying the *First Order* does not apply.

f) Level playing field/most favored nations

While in its initial Order, the FCC found that certain level playing field clauses interfered with competitive entry and therefore unenforceable, in the *Second Order* the FCC suggested that incumbent cable operators could enforce the provisions against the local franchising authority.

g) State exemption

While the *First Order* is clearly not applicable to states that limit local franchising authority, the *Second Order* does not mention the state exemption – and may call the validity of some recently-enacted state laws into question.

6. <u>The Sixth Circuit Upholds the *First Order*, and Endorses the FCC's Authority To Issue Rules Under "the Act"</u>.

In June 2008, the Sixth Circuit upheld the *First Order* in its entirety. *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). While the court of appeals noted that Section 621 is "silent as to the agency's role in the process of awarding cable franchises," it ruled that the FCC had jurisdiction to issue the order under Section 201(b), which provides: "The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b). Section 201(b) is, of course, one of the common carrier provisions of the Communications Act, and the quoted phrase is at the end of a section that has nothing to do with the regulation of cable providers. Nonetheless, the Sixth Circuit found that the provision had sweeping application to the Act as a whole.

Having concluded that Section 201(b) allowed the FCC to adopt rules to fill in "gaps" in the Cable Act, the court proceeded to find that the agency's "implementation" of the Section 621 franchising provisions was entitled to deference under the two-step framework provided by *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The court ruled that the word "unreasonably" in Section 621(a)(1) was ambiguous. *Alliance for Community Media*, 529 F.3d at 778. The court then proceeded to find that each element of the *First Order* was a "reasonable" interpretation of that statutory gap. *Id.* at 778-86. One notable exception was the "deemed granted" rule – which the court never analyzed at all. The court also ruled that the agency had not run afoul of the APA's bar on arbitrary and capricious action. *Id.* at 787.

On October 29, 2008, the Sixth Circuit denied the petitions for rehearing or rehearing *en banc* filed by local government petitioners. A petition for certiorari is likely to be filed.

B. The FCC's Preemption of Exclusive MDU Contracts

1. <u>Background and summary.</u>

In its 2003 Inside Wiring Order, the FCC decided that exclusivity clauses in contracts for service to multiple-dwelling units (MDUs) had both pro-competitive and anti-competitive effects. The Commission therefore decided not to regulate MDU exclusivity clauses. In November, the Commission decided that the entry of telephone companies into the cable market, and the national interest in broadband deployment and competition changed everything. The FCC invalidated exclusivity clauses in existing MDU contracts between cable operators and building owners, developers or managers, and prohibited cable operators from entering into or enforcing such contracts in the future. The FCC initiated a further notice of proposed rulemaking to consider whether it should ban other MDU contractual arrangements that might inhibit competition, and whether it should extend the ban to other providers of video services. *In The Matter Of Exclusive Service Contracts For Provision Of Video Services In Multiple Dwelling Units And Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, MB 07-51, FCC 07-189, 2007 WL 3353544 (November 13, 2007) ("*MDU Order*").

2. FCC authority for MDU Order.

The *MDU Order* is intriguing both for its substance (discussed below) and because of the claimed authority under which it was adopted.

The Commission ruled that Section 628 of the Cable Act, 47 U.S.C. § 548, gave it the authority to adopt the ban.[12] The FCC acknowledged that section, titled "Development Of Competition And Diversity In Video Programming Distribution" was primarily intended to ensure that competing multichannel video programming providers (such as DBS) could obtain access to satellite programming.[13] The FCC, however, ignored most of the provisions of Section 628 and focused on Section 628(b), which provides that "[i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."

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[12] The FCC also found that it had authority to adopt the ban based upon its "ancillary jurisdiction" over cable. It further found that adoption of the ban was consistent with the general competitive purposes of the Act, as well as Section 706 of the Telecommunications Act of 1996.

[13] MDU Order, n.132.

The FCC stated "we are not finding that Section 628(b) vests the Commission with some unlimited authority to limit unfair practices in the cable industry. Rather, we are finding that the language of Section 628(b) prohibits unfair methods of competition with the purpose or effect of hindering significantly or preventing MVPDs from providing satellite cable and broadcast programming to consumers."[14] Despite the disclaimer, the authority appears quite broad: the FCC seems to contend that authority permits it to regulate "types of conduct" that emerge as "barriers to competition and obstacles to the broader distribution of…video programming."[15] In the *MDU Order*, the FCC did not find that exclusive contracts actually provided cable operators significant market power in any relevant geographic market. There is no analysis typical of an antitrust case. Rather, the FCC found an actionable harm because, *inter alia*, (a) subscribers were denied a choice of providers; and (b) the effect of foreclosing the MDU market might be to prevent video competitors from entering the market altogether.

The FCC also found that exclusive contracts could prevent broadband deployment, because a company that could not offer a "triple play" of voice, video, and data in an MDU might be reluctant to extend fiber to MDUs or to other portions of the market – thus denying consumers the benefit of fiber.[16] The Commission rejected arguments that exclusivity clauses have any significant beneficial effect.

3. <u>Scope</u>

The *MDU Order* was limited both as to *what* it affected and *who* it affected.

a) What is an MDU?

"MDUs" include apartment, cooperative, and condominium buildings and other centrally managed real estate developments. "Thus, the term…also includes gated communities, mobile home

[14] Id.

[15] MDU Order, ¶ 49.

[16] *MDU Order*, ¶¶ 17-24.

parks, garden apartments, and other centrally managed residential real estate developments," and other "collections of private individual households with residents remaining for lengthy, indefinite periods of time, each in a dwelling space that is distinctly separate but shares some common spaces requiring central management." MDUs do not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing and other assisted living places, and other group quarters characterized by institutional living, high transience, or a high need for security.[17]

b) Who is covered by the ban?

The ban applies to cable operators, open video systems, and common carriers and their affiliates "that provide[] video programming by any means directly to subscribers." The ban does not apply to other video providers, including DBS and "private cable operators." Private cable operators include systems that provide video service without using public rights-of-way, such as SMATV systems. The FCC will consider whether to extend the ban to these entities as part of the *Further Notice.*[18] The FCC's future orders may be of particular significance because real estate developers in some communities are entering into exclusive easements which grant "infrastructure providers" the right to place communications facilities in developments – and require homeowners to pay a guaranteed "infrastructure fee" and often a "service fee" through the homeowner's association. The infrastructure provider then enters into contracts with selected service providers, who use the infrastructure to provide voice video and data services. The infrastructure providers claim that neither they nor the service providers are subject to the FCC rules – particularly with respect to the exclusive right to provide data services.

c) What is covered by the ban – services.

The ban covers contracts that grant an operator covered by the rule "the exclusive right to provide any video programming service

[17] MDU Order, ¶ 7.

[18] MDU Order, ¶ 61.

(alone or in combination with other services) to a MDU."[19] It has since been extended to cover exclusive contracts for telecommunications services.[20]

d) What is covered by the ban – types of contracts

By its terms, the ban only applies to contracts that give a cable operator the exclusive right to serve MDUs. It does not distinguish between exclusivity contracts based on length – a six month exclusive right is deemed as offensive as a ten-year right. The FCC distinguished between exclusive service contracts and:

- *exclusive marketing contracts* (contracts that permit more than one entity to provide service within a building, but which allow only one entity to market services directly to MDU residents).
- *bulk billing contracts* (contracts that require residents to pay for services from a selected provider even if the resident purchases services from another provider)
- *wire exclusivity contracts* (contracts that allow a provider into an MDU, but prohibit it from using existing wiring)

The validity of these contracts will be addressed in the *Further Notice.*[21]

*e) What is **not** covered by the Order*

The *MDU Order* does not *require* an MDU owner or developer to allow a second wireline entrant into the MDU.[22]

The *MDU Order* does not provide additional access to easements, beyond that provided in the Cable Act.[23]

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[19] 47 C.F.R. § 76.2000(a).

[20] In re Promotion of Competitive Networks in Local Telecommunications Markets, Report and Order, FCC 08-87, 23 FCC Rcd. 5385 (rel. March 21, 2008).

[21] MDU Order, n.2.

[22] MDU Order, n.92.

f) Review of the MDU Order

The National Multi-Housing Council and National Apartment Associations, as well as NCTA, filed petitions for review with respect to the *MDU Order*. The case has been briefed before the Court of Appeals for the D.C. Circuit.

C. Common Thread: FCC's Claim of Broad Authority To "Clarify" the Act.

The two rulemakings demonstrate that the FCC is willing to assert broad authority under the Communications Act, even in areas where it has been widely believed that the Commission's authority is limited. In fact, the decision in *Alliance for Community Media* has already emboldened the wireless industry to ask the FCC to expand its authority under the Act even further. In July 2008, CTIA – the Wireless Association, filed a Petition for Declaratory Ruling that (i) asks the Commission to "clarify" the Act by reading into it preemptive timelines for the local siting of cell towers, and (ii) requests that the Commission preempt certain local processes under Section 253. Comments have been filed but as of this writing, the FCC has taken no action on the Petition.

IV. THE TRANSITION TO DIGITAL HAS LED TO UNANTICIPATED CHALLENGES.

The third important trend that has emerged over the past year involves complexities arising out of communications companies' transitions from analog to digital (and to IP-based digital) technologies. Congress has mandated that after February 17, 2009, full-power television broadcast stations must transmit only digital signals and may no longer transmit analog signals.[24] Cable operators, of course, are not bound by this statutory deadline, and many plan to convert the broadcast signals back to analog and deliver them to subscribers. This has several advantages: it means that cable operators can advise consumers that, as long as they subscriber to cable, they can receive service without being required

[23] MDU Order, n.151.

[24] 47 U.S.C. §§ 309(j)(14) and 337(e).

to obtain a digital converter box.[25] At the same time, several operators are facing bandwidth constraints and are seeking to free bandwidth by converting channels to a digital format, or by delivering some channels using switched video technologies. Notably, several operators are converting PEG access channels to a digital format, while maintaining the remainder of the basic service tier in an analog format. The result is that subscribers with analog sets pay for the channels, but cannot receive them without going through a special process to obtain a converter box for every TV where the subscriber wishes to watch the channels – often at significant expense. In effect, the switch to digital format may provide cable operators incentives and opportunities to discriminate against particular types of programs or programmers, and may create new problems for viewers. As one court explained in a case discussed below:

> A fact that has become apparent through the progression of this litigation is that Congress did not contemplate the existence of digital cable as it is today. Nor did it contemplate a basic service tier which spans digital and analog formats. This is not surprising, given the rise in digital cable after the Telecommunications Act. Thus, to the extent the Court attempts to determine whether Comcast's proposed actions violate the requirements of the basic service tier, the Court is forced to apply an old rubric to a technology that was not foreseen by Congress in 1934, 1984, 1992, or 1996, when it otherwise spoke directly on these issues.

City of Dearborn v. Comcast of Michigan III, Inc., Case No. 08-10156, Order at 17, 10/03/2008. This article focuses on three

[25] Charter's guide to digital transition emphasizes that consumers can avoid the problems associated with obtaining a digital converter box by subscribing to cable. "If all of your TVs are connected to Charter, you will not need a DTV converter box because Charter already has the technology in place to handle the new digital format," it advises. "Charter Digital Transition Guide, dt'09."

issues related to problems created by the transition to digital on cable systems. The FCC and the courts appear poised to address many of these issues in 2009.

A. The Comcast-PEG Litigation in Michigan.

In late 2007, Comcast informed various Michigan communities that on January 15, 2008, it would carry PEG channels only in digital format. As a result, many analog customers would only be able to view the PEG channels if they acquired a digital converter, digital service, or other compatible equipment. Comcast planned to continue to deliver broadcast channels in an analog format.

On January 11, 2008, the City of Dearborn, the Charter Township of Meridian, and Sharon Gillette, a Comcast cable subscriber in Meridian Township, filed a Complaint against Comcast in the United States District Court for the Eastern District of Michigan in the case cited above. The plaintiffs alleged that Comcast's proposed actions violated: (a) the franchise agreements and local ordinances; (b) federal law, including 47 U.S.C. §§ 531, 541, 543(b)(7), and 544a; and (c) federal regulations, including 47 C.F.R. §§ 76.630 and 76.1603. The plaintiffs also filed a Motion for Preliminary Injunction to require Comcast to provide PEG channels in their current format and channel location pending final disposition of the case. This lawsuit was eventually consolidated with suits filed by the City of Warrant and Bloomfield Township. The Orders in the case, discussed below, are attached.

On January 14, 2008, the court granted the plaintiff's motion for a temporary restraining order and preliminary injunction. The court rejected Comcast's argument that Michigan's Uniform Video Services Local Franchise Act of 2006, M.C.L. § 484.3301 *et seq.* invalidated PEG carriage requirements in plaintiff's franchises.[26]

[26] Michigan adopted a law which leaves franchising authority at the local level, but which establishes statewide uniform franchise standards. Those standards incorporate federal law requirements, including any obligation to carry PEG channels on the basic service tier. However, Comcast argued that the state law did not dictate how or where the PEG channels could be carried, and it argued that more specific requirements in locally-issued franchises

As the court explained, "By its terms, the Michigan Franchise Agreement requires compliance 'with all valid and enforceable federal and state statutes and regulations,' and this compliance is not 'additional' to anything in the franchise agreement." Opinion and Order, at 6 (Jan. 14, 2008). The court also found that the Plaintiffs were likely to prevail on certain federal claims that they had raised – including a claim that the Comcast actions violated its federal statutory and regulatory obligations to carry PEG on the basic service tier. The court found that the plaintiffs would suffer irreparable if the status quo were not maintained. *Id.* at 12.

On April 30, 2008, Comcast filed a Motion to Dismiss the Complaint. The company maintained that "[n]one of the statutes, regulations, or authorities relied upon by Plaintiffs create enforceable obligations that would be violated by Comcast's conversion of PEG channels to a digital format and new channel locations."[27] Comcast also argued that "any rights the Plaintiffs might claim under their local cable franchises to prevent Comcast's PEG digitization have been preempted" by the new Michigan franchising law.[28]

The court granted Comcast's Motion in part, and denied it in part. The court ruled that 47 U.S.C. § 531(c), which permits a franchising authority to enforce PEG channel requirements in franchise agreements, preempts the Michigan Uniform Franchise Act to the extent that law would deprive a franchising authority of the power to enforce such requirements.[29] The court dismissed Plaintiffs' claim that 47 U.S.C. § 531(e) – which states that a cable operator "shall not exercise any editorial control over any public, educational, or governmental use of channel capacity" – barred Comcast's proposed actions.[30] The court also found that, under 47 U.S.C. § 401(b), Plaintiffs had an express right of action to enforce

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adopted prior to the passage of the Michigan Act were no longer enforceable.

[27] Comcast Motion to Dismiss at ¶ 2 (April 30, 2008).

[28] *Id.* at ¶ 4.

[29] Order (10/03/2008), at 9.

[30] *Id.* at 12.

FCC orders requiring PEG to be carried on the basic tier.[31] However, the court also decided that it would refer the matter to the FCC, under the primary jurisdiction doctrine.[32] As the court put it:

> The FCC has "special competence" in matters of cable technology. Not only would its expertise assist in the resolution of the distinctions and similarities of analog and digital service, the FCC's perch atop the technological progression of the cable industry from its inception allows it to apply its institutional knowledge to a new and emerging technology. The issues before the Court turn on the technological nature of the distinctions between analog and digital formats, a question not within the expertise of judges.[33]

As a result, the court proposed six questions that it planned to refer to the FCC, after receiving comments from the parties.[34] Both Plaintiffs and Comcast moved the court to reconsider certain aspects of its decision. On November 24, 2008, the court rejected Comcast's certification request, and its motion for reconsideration.[35] Plaintiffs' motion was rejected in part the following day,[36] and the Court also issued an Order identifying questions to be referred to the FCC.[37]

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[31] *Id.* at 13.

[32] *Id.* at 18.

[33] *Id*.

[34] *Id.* at 21-22.

[35] Order Denying Defendants' Motion for Reconsideration, No. 08-10156, at 4 (November 24, 2008).

[36] Order Denying In Part Plaintiffs' Motion For Partial Reconsideration, No. 08-10156 (November 25, 2008).

[37] Order Referring Seven Questions To the Federal Communications Commission Pursuant To The Primary Jurisdiction Doctrine, No. 08-10156 (November 25, 2008).

In its reconsideration motion, Comcast had asked the court to rule that Section 544(e) of the Cable Act authorizes it to transmit PEG channels in any format. Section 544(e) states, "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." The court rejected Comcast's claiming, finding that Section 544(e) does not affect local authority to enforce PEG requirements in a franchise, even where those may affect an operator's technological choices. Quoting from an FCC Order, the court stated that the Cable Act "affirms the ability of an LFA to establish and enforce franchise provisions concerning facilities and equipment related to PEG channels and for educational and governmental use of channel capacity on institutional networks."

Plaintiffs asked the Court to rule that converting PEG channels to a digital format and making them less accessible to subscribers violated 47 U.S.C. § 531(e), which generally prohibits cable operators from exercising "editorial control" over PEG channels. The district court rejected that argument, noting that "courts interpret 'editorial control' under section 531(e) to mean cable operators are prohibited only from controlling the content of PEG channels."

The Court referred the seven questions in the attached Order to the FCC, and directed Plaintiffs to file a Petition submitting those questions to the FCC. Among other things, the FCC will be asked to decide whether the federal obligation to carry PEG channels on the basic service tier applies in communities that face effective competition.

B. The FCC Stepping In?

As of this writing**,** it is unclear what process the FCC will adopt to address the questions. But it is becoming clear that the FCC may step in and address issues surrounding cable's digital transition, including the PEG issues. In recent testimony before Congress, a representative of the FCC expressed concern over the treatment of PEG channels:

> Under Section 623, the basic service tier must include "PEG access programming required by

> the franchisee to be provided to subscribers." The Commission's regulations state that the basic service tier shall include at a minimum all local broadcast signals and any PEG programming required by the franchise to be carried on the basic tier**.** It has come to our attention that some programmers are moving PEG channels to a digital tier, or are treating them as on-demand channels. We are concerned by these practices. We believe that placing PEG channels on any tier other than the basic service tier may be a violation of the statute, which requires that PEG access programming be placed on the basic service tier. *Subjecting consumers to additional burdens to watch their PEG channels defeats the purpose of the basic service tier.* We believe it is important to ensure that consumers are able to get access equally to all channels belonging on the basic service tier, and that this should be the case regardless of what type of system the channels are being carried on.

Public, Educational, and Governmental (PEG) Access to Cable Television Before the House Subcomm. on Financial Services and General Government, September 17, 2008 (statement of Monica Shah Desai, Chief of the Media Bureau Federal Communications Commission) (emphasis added).

The FCC has already offered some clarification with respect to cable operators' carriage obligations during a transition to digital. For example, the FCC ruled that cable operators must take steps to ensure the viewability of broadcast signals:

> [C]able operators must comply with the statutory mandate that must-carry broadcast signals "shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection," and they have two options of doing so. First, to the extent that such subscribers do

> not have the capability of viewing digital signals, cable systems must carry the signals of commercial and non-commercial must carry stations in analog format to those subscribers, after downconverting the signals from their original digital format at the headend.. . . In the alternative, operators may choose to operate "all-digital systems." Under this option, operators will not be required to downconvert the signal to analog, and may provide these stations only in a digital format. In any event, any downconversion costs will be borne by the operator.[38]

The FCC Enforcement Bureau also recently issued letters of inquiry to 13 cable companies to determine whether the cable companies violated any FCC rules as part of the transition from analog to digital.[39] The cable operators have now responded to the letters, but the FCC has yet to take any action in the matter.[40] In October of 2008, the FCC issued a notice of apparent liability to Cox Communications, Inc., for what the agency characterized as an apparently willful violation of Section 76.1201 and 76.640(b)(1) of the Commission's rules.[41] The Commission found that Cox violated Section 76.640(b)(1) by moving certain channels to a Switched Digital Video Platform in its Fairfax County, Virginia, cable system. As the Commission explained:

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[38] *In re Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, FCC 07-170, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd. 21064 ¶ 18 (Nov. 30, 2007).

[39] Ted Hearn, *MSOs Respond to FCC Rate Investigation*, Multichannel News, Nov. 14, 2008, *available at*: http://www.multichannel.com/article/CA6614810.html?industryid =47200

[40] *Id*.

[41] *In re Cox Communications, Inc., Fairfax County, Virginia Cable System*, DA 08-2299, EB-07-SE-351 (October 15, 2008).

> After Cox's movement of linear programming to an SDV platform, customers who use CableCARD-equipped UDCPs can no longer receive that programming without leasing a set-top box from the company. Those customers who choose to lease a set-top box not only must bear the additional cost, but also lose many features of their UDCPs, such as picture-in-picture viewing and the ability to record one channel while watching another. Accordingly, Cox is preventing its customers from using their UDCPs and undermining the policy goals of Congress and the Commission to ensure the commercial availability and use of navigation devices.[42]

C. An Elephant in the Room? The AT&T PEG Solution.

The efforts by incumbent operators like Comcast to shift PEG channels to a digital format while delivering other channels in an analog format is of great concern to many in the PEG community. However, as troubling, if not more so, is the approach to PEG by AT&T on its U-Verse system. AT&T delivers video using Internet Protocol. Despite the difference in the delivery technology, most commercial channels are delivered in a manner which allows them to be selected and viewed in much the same way that commercial channels are viewed on traditional cable systems.

PEG access programming is not delivered via a channel. It is delivered via what AT&T calls its "PEG application." When one tunes a converter to "99," the PEG application starts. After a significant delay, the viewer is presented with a menu that lists all PEG channels for every community within the designated market area served by its system. In some areas, the DMA is large enough that the list could include dozens of channels. The viewer then must scroll through the list, and select a feed: what the viewer then receives is a streaming video feed that many claim is inferior in

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[42] *Id.* at ¶ 23.

quality and functionality to regular commercial video channels carried on the system.[43]

Indeed, the California Public Utility Commission's Division of Ratepayer Advocates identified problems including the following in a letter to Congress attached to this paper: (i) closed captioning and secondary audio for PEG channels are unavailable; (ii) picture quality of PEG channels is inferior to the quality of commercial channels; (iii) DVRs cannot be set to record PEG programs; (iv) PEG channels are harder to locate than commercial channels because of U-Verse program menus and cannot be selected in the same way; (v) it takes longer to access PEG channels than other channels; (vi) PEG channels are not correlated with a separate and specific channel number; and (viii) the feed automatically switches off after a specified viewing period – impacting longer programs.[44] AT&T appears to admit that its PEG application cannot do some things that commercial channels can do – for example, the PEG application cannot pass through closed captioning.[45]

The PEG application raises several significant questions: first, is the AT&T system a cable system, subject to the same rules as traditional cable systems? Second, is the PEG application a "channel" within the meaning of the Cable Act and the FCC rules? Third, does the system comply with closed captioning requirements? Fourth, is it consistent with the Cable Act to deliver PEG programming in a manner that makes it much more difficult to access than other programming? Finally, is the PEG application consistent with *state* laws (like California state law) which require that PEG channels be delivered with the same functionality and quality as other commercial channels? The answer to those questions – which may be raised in litigation or in FCC proceedings in 2009 – is likely to define not only the rights of the

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[43] Todd Spangler, *AT&T Knocked for Inferior 'PEG' Channels*, Multichannel News, Jan. 31, 2008, *available at*: http://www.multichannel.com/article/CA6527813.html

[44] Letter from Dana Appling, Director, to Rep. Jose Serrano, dated September 9, 2008.

[45] AT&T PEG Roadmap (attached).

public and PEG programmers, but also some of the rules for video competition in a digital world.

Attachment 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DEARBORN, ET AL,

Plaintiff(s),

CASE NUMBER: 08-10156
HONORABLE VICTORIA A. ROBERTS

v.

COMCAST OF MICHIGAN III, Inc., ET AL,

Defendant(s).
________________________________/

ORDER DENYING IN PART PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION

I. INTRODUCTION AND PROCEDURAL HISTORY

On October 3, 2008, the Court granted in part and denied in part Defendants Comcast of Michigan III, Inc.; Comcast of the South, Inc.; Comcast of Warren; and Comcast of Macomb's (collectively "Comcast") "Motion to Dismiss." (Doc. #41).

The Court dismissed Plaintiffs' 47 U.S.C. §531(e) claim with prejudice for two reasons: (1) the legislative history does not directly support Plaintiffs' argument that section 531(e) prohibits Comcast from making its proposed changes; and (2) Plaintiffs did not cite any case law to support their argument.

Plaintiffs ask the Court to reconsider its decision and reinstate their 47 U.S.C. §531(e) claim. (Doc. #53). According to Plaintiffs, they did not rely solely on legislative history to support their 47 U.S.C. §531(e) claim. Plaintiffs say they rely on: (1) legislative history; (2) the plain language of the statute; and (3) case law that interprets the term "editorial control."

In the alternative, Plaintiffs ask the Court to refer its 47 U.S.C. §531(e) claim to the Federal Communications Commission ("FCC").

Further, Plaintiffs ask the Court to correct an error in its October 3rd Order. The Order says, "The estimates of how many households in Michigan will be affected if Comcast is allowed to make the proposed changes ranges from 15,000 to 50,000." Plaintiffs say that range encompasses the Charter Township of Meridian and the City of Dearborn alone, not the entire state of Michigan.

Comcast responded on October 30, 2008. (Doc. #57). On November 19, 2008, Comcast filed a "Notice of Supplemental Authorities." (Doc. #63). Comcast attached: (1) a letter from the State of Connecticut Department of Public Utility Control dated November 12, 2008 ("Connecticut Letter"); and (2) an order from the Commonwealth of Massachusetts Department of Telecommunications and Cable dated November 17, 2008 ("Massachusetts Order").

Plaintiffs filed a "Response to Comcast Notice of Supplemental Authority" on November 21, 2008. (Doc. #64). They say the Connecticut Letter and the Massachusetts Order are irrelevant.

The Court finds neither the Connecticut Letter nor the Massachusetts Order adds anything substantive to Comcast's argument.

II. STANDARD OF REVIEW

Eastern District of Michigan Local Rule 7.1(g)(3) provides for reconsideration if the movant demonstrates a palpable defect by which the Court and the parties have been misled, and further demonstrates that correcting the defect will result in a different disposition of the case. "A 'palpable defect' is a defect which is obvious, clear, unmistakable, manifest, or plain." *Fleck v. Titan Tire Corp.*, 177 F.Supp.2d 605, 624 (E.D. Mich. 2001). "[T]he court will not grant motions for rehearing or reconsideration which merely present the same issues ruled upon by the court, either expressly or by reasonable implication." L.R. 7.1(g)(3).

III. APPLICABLE LAW AND ANALYSIS

A. Editorial Control Pursuant to 47 U.S.C. §531(e)

Under 47 U.S.C. §531(e), a cable operator "shall not exercise any editorial control over any public, educational, or governmental use of channel capacity."

The Court must determine what Congress means by "editorial control."

Plaintiffs argue that "editorial control" under section 531(e) means Comcast cannot control the content of PEG channels, nor the availability and accessibility of PEG channel programming. In support, they cite *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Time Warner Entm't Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003); and *In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5781 (1992).

The Court disagrees. Neither the cases nor the FCC regulation Plaintiffs rely on defines "editorial control" under 47 U.S.C. § 531(e).

More importantly, courts interpret "editorial control" under section 531(e) to mean cable operators are prohibited only from controlling the content of PEG channels. Courts hold that section 531(e) "bars the operator from attempting to determine the *content of programming* that is within the PEG [channel] categories." *Time Warner*

Cable of New York City v. Bloomberg L.P., 118 F.3d 917, 928 (2nd Cir. 1997) (emphasis added); *see also Morrone v. CSC Holdings Corp.*, 404 F.Supp.2d 450, 455 (E.D.N.Y. 2005); *Glendora v. Brading*, 2002 WL 31971936 at *2 (D. Or. July 10, 2002).

Comcast's proposed changes do not involve control over the content or the programming of PEG channels. Accordingly, Plaintiffs do not state a cause of action under 47 U.S.C. §531(e), and there is no reason to reinstate that claim or refer it to the FCC.

B. Number of Households Affected by Comcast's Proposed Changes

Comcast says the Court could simply remove the number of households that could be affected by its proposed changes from its Order dated October 3, 2008 because that information is not essential to the Order. If the Court decides to keep that information in the Order, Comcast says the Court should "conform the reference to the record."

To keep the October 3, 2008 Order consistent with the Court's Opinion and Order dated January 14, 2008, the October 3rd Order should say, "Plaintiffs say the change will affect more than 50,000 households within the Charter Township of Meridian and the City of Dearborn alone. Comcast says only 50% of its statewide customers subscribe to the limited basic tier of service, and estimate that the change will only affect 15,000 households."

IV. CONCLUSION

Plaintiffs' motion for reconsideration is **DENIED IN PART**; the Court **AFFIRMS** its dismissal of Plaintiffs' 47 U.S.C. §531(e) claim.

Further, the Court enters an Amended Order that reflects the change in the number of households affected by Comcast's proposed changes.

IT IS ORDERED.

s/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: November 25, 2008

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on November 25, 2008.

s/Carol A. Pinegar
Deputy Clerk

Attachment 9

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DEARBORN, ET AL,

Plaintiff(s),

CASE NUMBER: 08-10156
HONORABLE VICTORIA A. ROBERTS

v.

COMCAST OF MICHIGAN III, Inc., ET AL,

Defendant(s).
________________________________/

ORDER REFERRING SEVEN QUESTIONS TO THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO THE PRIMARY JURISDICTION DOCTRINE

On October 3, 2008, the Court stated its intent to refer six questions to the Federal Communications Commission ("FCC") and stayed Plaintiffs' claim under 47 U.S.C. §543(b)(7) pending a ruling from the FCC. *See* Order dated October 3, 2008.

On October 17, 2008, Plaintiffs and Defendants submitted comments on the proposed questions. (Doc. #50 and #52).

Defendants filed a "Notice of Supplemental Authorities" on November 19, 2008. (Doc. #63). The notice included: (1) a letter from the State of Connecticut Department of Public Utility Control dated November 12, 2008 ("Connecticut Letter") and (2) an order from the Commonwealth of Massachusetts Department of Telecommunications and Cable dated November 17, 2008 ("Massachusetts Order"). The Court assumes Defendants are saying referral to the FCC is unnecessary based on the Connecticut Letter and the Massachusetts Order.

The Connecticut Letter says, "The Department [of Public Utility Control] has determined that digital transmission of community access channel programming is permissible under Federal law." The Massachusetts Order says, "[b]ased on current federal law, we find that Comcast's channel migration [from the analog to the digital platform] is lawful." However, Massachusetts made clear that if the FCC finds channel migration violates its rules, it will enforce that FCC policy.

Plaintiffs filed a "Response to Comcast Notice of Supplemental Authority" on November 21, 2008. (Doc. #64). They say the Connecticut Letter and the Massachusetts Order are irrelevant.

The Court declines to dismiss Plaintiffs' 47 U.S.C. §543(b)(7) claim based on the Connecticut Letter and the Massachusetts Order. Neither the letter nor the order is binding on this Court, and the FCC has the special competency in matters of cable technology to issue a ruling this Court can rely upon.

The Court refers seven questions to the FCC:

(1) Does it constitute an "evasion" of applicable rate regulations (or any other regulation) when cable operators: (a) require some subscribers to purchase/lease converter boxes to view public, educational and governmental channels ("PEG channels"); and (b) provide PEG channels in digital format on the basic-service tier while non-PEG channels on the basic-service tier are provided in analog format? (*See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, 8 FCC Rcd 5631, 5915-5917 (F.C.C. 1993):

> We define a prohibited evasion as any practice or action which avoids the rate regulation provisions of the Act or our rules contrary to the intent of the Act or its underlying policies. We also believe that . . .: (1) implicit rate increases; (2) a significant decline in customer service without a similar decline in price; and (3) deceptive practices such as improper cost shifting or intentionally misstating revenues [are evasions].

(2) Does the requirement to provide PEG channels on the basic-service tier apply to all cable operators or are cable operators in communities where

rates are subject to "effective competition" (or otherwise deregulated) excluded from this requirement? (*See* Pl. Response Br. p.19 n.16 "Comcast has argued that the requirement to provide PEG [channels] on [the] basic service tier does not apply in communities where rates are subject to effective competition. Plaintiffs disagree"; *see also* H.R. Rep. No. 102-628 at 85 (1992) (PEG channels must be "available to all community members on a nondiscriminatory basis")).

(3) Does the Court look from the consumer's point-of-view to determine whether: (a) a programming service is part of the basic-service tier; and (b) the proposed digitization of PEG channels but not other channels is "discriminatory" (because *e.g.*, some customers may be required to obtain additional equipment or make special requests for additional equipment to view PEG channels)? (*See* H.R. Rep. No. 102-628 at 85 (1992) (PEG channels must be "available to all community members on a nondiscriminatory basis")).

(4) What is the criteria for a channel to be considered part of the basic-service tier? If cable operators require customers to purchase/lease digital receiving equipment to view PEG channels, are those channels *per se* a separate "service tier" within the meaning of 47 U.S.C. §522(17)?

(5) Are cable operators precluded from charging for equipment used in connection with the reception of PEG channels on the basic-service tier when equipment is not needed to receive non-PEG channels on the basic-service tier?

(6) Can PEG channels be digitized, require special equipment to be accessed (or be subject to other burdens with respect to the need to make a special request to receive equipment and the placement of channels), and still be considered carried on the basic-service tier when non-PEG channels on the basic-service tier are not digitized and do not require special equipment to be accessed?

(7) Is digitization of PEG channels "discriminatory" because some customers may be required to make a special request to obtain additional equipment to view the channels, while customers are not required to obtain additional equipment to view non-PEG channels?

To start the proceedings in the FCC, Plaintiffs must attach this Order to a petition for declaratory ruling and file it with the FCC.

IT IS ORDERED.

s/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: November 26, 2008

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on November 26, 2008.

s/Linda Vertriest
Deputy Clerk